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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 426

SAMUEL STROBL,

Petitioner,

vs.

JOHN ZIDEK, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS.

BRIEF FOR RESPONDENT IN OPPOSITION.

JOHN ZIDEK, JR.,
Respondent pro se.

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OPINION BELOW.

The opinion of the Appellate Court appears in 304 Ill. App. 385, and on pages 150-155 inclusive of the record herein.

JURISDICTION.

The judgment sought to be reviewed was entered by said Appellate Court on April 8, 1940, reversing the decree of the trial Court (R. 149). On June 21, 1940, there was filed in said Appellate Court a certified copy of an order of the Supreme Court of Illinois entered on June 17, 1940, in case No. 25747, entitled *Samuel Strobl, Petitioner,* v. *John Zidek, Jr., Respondent,* denying petitioner's petition for leave to appeal (R. 156, 157).

STATEMENT OF THE CASE.

The original decree, entered on January 7, 1924, awarded petitioner damages in the sum of $12,782.07 (R. 13), but not "for the wrongful destruction of his business by the respondent," as set forth by petitioner under the caption "The Matter Involved." Instead, said award of damages was for: (1) the balance found to be due for wheels manufactured during the first year of a five-year contract between the parties (R. 94, 95, Pars. 28, 29, 30); and (2) loss of profits during the remaining four years of the contract period (R. 98, Par. 35).

In 1919, the parties entered into a contract whereby Zidek agreed to advance funds, and Strobl to manufacture metallic wheels exclusively for Zidek (R. 22-28, and Master's report, R. 81, Par. 4). Unfortunately, because of an oversight the copy of the contract held by Strobl was incomplete, in that the figure "30" limiting the overhead in the cost of production, had been omitted from a blank space (R. 90, 26, 82). Each party stood on the copy of the contract respectively held by him, and a dispute arose over the price that Zidek was to pay for the wheels. At the close of the first year, the parties had a conference with respect to differences that had arisen, and the Master finds that:

> "Mr. Zidek became *convinced* that he was not then indebted to Mr. Strobl. He stated his *convictions* and left the conference" (R. 83, Par. 9). (Italics ours.)

He, thereafter, wrote a letter (Defendant's Ex. 5, R. 83), to Strobl in which he stated that 13¢ per wheel had been agreed upon, and he refused to pay more or to advance

further funds. Respondent "treated the letter as such repudiation as put an end to the contract * * * and sued for the profits he would have realized if he had not been prevented from performing his contract and also for the losses he had sustained" (Master's report, pp. 88, 89, Par. 14).

The history of the litigation in the bankruptcy court over a period of thirteen years is substantially correct as set forth on page 2 of said petition. This terminated with Judge Wilkerson's "Memorandum" opinion entered on December 2, 1937 (R. 19-21).

While it may be somewhat doubtful as to whether the complaint stated a cause of action *in tort*, an examination of the Master's report shows clearly that respondent was not in any sense liable in tort. On this issue the Master found against Strobl, and declined to recommend in his report that Zidek redeliver machinery purchased by him at the sheriff's sale of Strobl's property (R. 99, 100, Par. 38); and refused to make a finding on the charge in the complaint that Zidek had copied Strobl's dies and machinery (R. 93, Par. 24).

Contrary to petitioner's statement, the Master at no place found that the respondent intentionally destroyed petitioner's business; at no place found that the entire conduct of respondent showed his determination to ruin Strobl. The reference to the record (p. 92) contained on page 3 of the petition, is confined to the two lawsuits filed by Zidek against Strobl, on the same day that Strobl sued Zidek. (This is more fully discussed under Point II, p. 10 this brief.)

SUMMARY OF ARGUMENT.

I.

THE APPELLATE COURT PROPERLY DECIDED THE FEDERAL QUESTION, THAT THE DECREE ENTERED ON JANUARY 7, 1924, AWARDED NO DAMAGES FOR WILFUL AND MALICIOUS INJURIES TO PETITIONER'S PROPERTY, BUT ONLY FOR THOSE DAMAGES RESULTING FROM A BREACH OF CONTRACT, AND THAT THE DECREE WAS DISCHARGED IN BANKRUPTCY.

Section 17 of the Bankruptcy Act reads in part:

> "A discharge in bankruptcy shall release a bankrupt of all his provable debts, except such as * * * (2) are liabilities * * * for wilful and malicious injuries to the * * * property of another," etc.

Section 63a of the Bankruptcy Act, defining "provable debts," reads in part:

> "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment * * * (4) founded upon an open account, or upon a contract express or implied."

Crawford v. *Burke*, 195 U. S. 176, 193;

Davis v. *Aetna Acceptance Co.*, 293 U. S. 328, 332, 333;

Kreitlein v. *Ferger*, 238 U. S. 21, 27;

Tindle v. *Birkett*, 205 U. S. 183, 186.

II.

THE FINDING OF THE MASTER THAT ZIDEK'S SUING STROBL AND LEVYING ON HIS MACHINERY PROVED HIS DETERMINATION TO RUIN STROBL, DOES NOT RENDER THE DECREE ONE FOR MALICIOUS INJURIES TO STROBL'S PROPERTY.

(a) The Master also found that Zidek "was clearly within his rights in filing the suits" (R. 92). He was, therefore, not guilty of malice in prosecuting them.

38 Corpus Juris, pp. 398,401;

Leyenberger v. *Paul,* 12 Ill. App. 635, 637;

Tumalty v. *Parker,* 100 Ill. App. 382, 388.

(b) The Master found against petitioner on allegations in his complaint charging tortious conduct. (R. 92, 93, Par. 24; R. 99, 100, Par. 39.)

III.

PETITIONER'S ARGUMENT IS UNCONVINCING, THAT THE BREACH OF CONTRACT BY ZIDEK GAVE RISE TO AN ACTION IN TORT, AND THAT, ALTHOUGH THE COMPLAINT DOES NOT CONTAIN THE WORD "MALICIOUS," THE RESULT WAS, NEVERTHELESS, A MALICIOUS TORT, AND THAT THE DECREE WAS NOT DISCHARGED IN BANKRUPTCY.

The issue is *not what the cause of action may have been,* but rather what is the character of the *Master's report,* and the *decree* which approve it, and which petitioner has sought to revive.

Sections 17 and 63a of the Bankruptcy Act.

IV.

JURISDICTION WAS NOT CONFERRED ON THIS COURT BY THE APPELLATE COURT'S ADDITIONAL, BUT WHOLLY UNNECESSARY REASON FOR REVERSING THE TRIAL COURT'S DECREE OF REVIVOR, NAMELY, THAT PETITIONER'S PLEADING IN 1924, IN HIS OBJECTIONS TO THE RESPONDENT'S DISCHARGE IN BANKRUPTCY, THAT HIS CLAIM WOULD BE "AFFECTED BY THE DISCHARGE OF SAID BANKRUPT," AND HIS LITIGATION ON THAT THEORY FOR THIRTEEN YEARS IN THE BANKRUPTCY COURT RESULTED IN AN ADJUDICATION THAT HIS MONEY DECREE WAS DISCHARGEABLE.

To confer jurisdiction on this Court to entertain a petition for writ of certiorari the federal question alleged to have been improperly decided in the State Court must have been necessary to the determination of the cause.

28 U. S. C. A. Sec. 344;

Harrison v. *Morton,* 171 U. S. 38, 47;

Cook County v. *Calumet & Chicago Canal & Dock Co.,* 138 U. S. 635, 651;

De Saussure v. *Gaillard,* 127 U. S. 216, 234;

Murdock v. *Mayor, etc of Memphis,* 87 U. S. 590, 636, 22 L. Ed. 429, 444.

V.

ON PAGES 12-16 OF HIS BRIEF, PETITIONER HAS MADE ALLEGATIONS AND CHARGES, TOO SERIOUS TO BE IGNORED, BUT WHICH ARE NOT WITHIN THE SCOPE OF HIS PETITION, ARE NOT SUPPORTED BY ANYTHING IN THE RECORD, AND THE SAME SHOULD BE DISREGARDED BY THIS COURT.

Gunning v. *Cooley*, 281 U. S. 90, 98;

Webster Electric Co. v. *Splitdorf Electrical Co.*, 264 U. S. 463, 464;

Alice State Bank v. *Houston Pasture Co.*, 247 U. S. 240, 242;

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Johnson v. *Manhattan Ry. Co.*, 289 U. S. 479, 494;

Zellerbrach Paper Co. v. *Helvering*, 293 U. S. 172, 182.

ARGUMENT.

I.

(REPLY TO POINTS "VI" & "VII" PETITIONER'S BRIEF.)

The Appellate Court properly decided the Federal Question, that the decree entered on January 7, 1924, awarded no damages for wilful and malicious injuries to petitioner's property, but only for those damages resulting from a breach of contract, and that the decree was discharged in bankruptcy.

The question decided by the Appellate Court was one of fact, determined from the character of the Master's report, and of the decree which approved it (R. 75-102, R. 9-14).

The applicable portions of the Bankruptcy Act, Sections 17 and 63a, are set out under Point I (p. 4 of this brief).

Under Section 63a, the original money decree was, in form "a fixed liability," and was *provable*. The remaining question, and the only issue in the case, is whether the decree purports to award damages "for wilful and malicious injuries" to plaintiff's property. The Appellate Court held that the decree awarded no such damages, and that it was accordingly discharged by Zidek's bankruptcy.

Since it becomes important to note the exact ground on which the Appellate Court placed its decision, we quote its holding in the following language:

> "We do not stop to decide this question (whether in a suit for revivor, the evidence taken before the Master in the original suit is competent) for the reason that we are of opinion that in either view, plaintiff cannot

recover. *A consideration of the record discloses plaintiff's suit was based on his contention that defendant had breached the written contract entered into between them, and the report of the Master and the decree are to the same effect. The method of accounting by the Master, approved by the decree, awards plaintiff the amount due him under the accounting, and for damages he sustained by reason of the breach. No vindictive or punitive damages are allowed.* The record discloses that on the day plaintiff filed his suit for an accounting, defendant Zidek brought two suits against plaintiff on notes executed by plaintiff to evidence moneys advanced by defendant to him under the contract, and after the judgments were entered in these two cases, Zidek caused a levy to be made on some of plaintiff's property and it was sold. The Master, in passing on this question said: 'Whatever may be argued against the wisdom of the conduct of Zidek in bringing this series of suits from a business standpoint or one of morals I find that the defendant herein, John Zidek, Jr., was clearly within his legal rights in filing the suits in question and that they were not prematurely brought. The course of conduct of Zidek shown by the several suits at law proves, however, beyond doubt the repudiation by Zidek of the contract between Strobl and Zidek as set forth in Paragraph 4 of this report and his determination to ruin Strobl.'

• • •

"A number of other matters are pointed out by counsel for plaintiff as indicating that defendant's action was malicious, but we think it would serve no purpose to discuss these matters in detail because we are of opinion that his contention was not sustained by the Master or by the Chancellor.

"Upon a consideration of the whole record, we think plaintiff has failed to show that the action of defendant

was of such a character as would prevent his claim from being discharged in bankruptcy'' (R. 152, 153, 154). (Italics ours.)

The foregoing excerpt from the Appellate Court's opinion states the real ground for its reversal of the decree of revivor, is strictly in accordance with the portions of Sections 17 and 63a of the Bankruptcy Act quoted under Point I (p. 4 this brief) and with the applicable decisions of this and the various Circuit Courts of Appeal. Being a decree for a definite sum, it was provable, and since it was not an award for vindictive damages, or for malicious injuries, it was discharged in bankruptcy. (*Crawford* v. *Burke,* 195 U. S. 176, 193, and other authorities cited under Point I, p. 4 this brief). The only federal question necessarily involved was, therefore, properly decided by the Appellate Court.

II.

(REPLY TO POINTS "IV" & "V," PAGE 21, PETITIONER'S BRIEF.)

The finding of the Master that Zidek's suing Strobl and levying on his machinery proved his determination to ruin Strobl, does not render the decree one for malicious injuries to Strobl's property.

The foregoing finding of the Master appears at the close of the first paragraph of the foregoing excerpt from the Appellate Court's opinion. It is to be noticed that the Master also found that Zidek "was clearly within his legal rights in filing the suits in question" (R. 92, 153). He, therefore, had *not only probable cause, but also a good and meritorious cause of action.* He could not, under those circumstances, be found to be guilty of prosecuting them maliciously. (See 38 Corpus Juris, 398, 401, and other authorities cited under Point II (a) of this brief.)

Moreover, the Master found against petitioner on allegations in his complaint which might be considered as charging tortious conduct (R. 92, 93, Par. 24; R. 99, 100, Par. 39). Nor can it be overlooked that the Appellate Court found that "No vindictive or punitive damages were allowed," and that the award was merely for damages resulting from a breach of contract (R. 153).

III.

(REPLY TO POINT "VIII," PAGE 23, PETITIONER'S BRIEF.)

Petitioner's final argument is unconvincing, that the breach of contract by Zidek gave rise to an action in tort, and that, although the complaint does not contain the word "malicious," the result was, nevertheless, a malicious tort, and that the decree was not discharged in bankruptcy.

The issue is not whether there was a *cause of action* for a malicious tort, but what did the Master find in his *report*, and what was the Court's *decree*. The Master found that Zidek acted without malice, and that Strobl had been damaged by Zidek's breach of the contract. He reports that, *"The complainant's solicitor argues • • • that the measure of damage is definitely fixed by the contract"* (R. 98, Par. 35). The Master adopted petitioner's view at the trial and awarded damages to compensate him for his loss under the contract only. Moreover, as we have above pointed out, the Master refused to find for petitioner on charges of tortious conduct (R. 93, Par. 24; R. 99, Par. 39).

IV.

(REPLY TO POINTS "I," "II," "III," PETITIONER'S BRIEF.)

Jurisdiction was not conferred on this Court by the Appellate Court's additional, but wholly unnecessary, reason for reversing the trial Court's decree of revivor, i.e., that petitioner's pleading in 1924, in his objections to the respondent's discharge in bankruptcy, that his claim would be "affected by the discharge of said bankrupt," and his litigation on that theory for thirteen years in the bankruptcy court, resulted in an adjudication that his money decree was dischargeable.

The holding of the Appellate Court set out in the foregoing excerpt of its opinion (p. 8 this brief) is decisive. Anything beyond the finding and holding that the money decree awarded damages merely for breach of contract, and not for malicious injuries was mere surplusage. The language of the portion of the opinion especially relied on by petitioner shows clearly that it was just an additional reason, supplementing the real ground for reversal. It reads:

> "There is *another reason* why the decree cannot stand. Plaintiff, in his verified objections to defendant's discharge in the bankruptcy court, after setting up that his claim had been filed and allowed in the bankruptcy proceeding, said that his claim would be 'affected by the discharge of said bankrupt'—*i.e.,* that the claim would be released if the bankrupt were discharged. The question was litigated and relitigated a number of times in the Federal Court, as shown by the opinion of Judge Wilkerson and adjudicated against Strobl. Therefore, the same question cannot be relitigated as was sought to be done in the instant case" (Rec. 154). (Italics ours.)

Since this portion of the opinion was wholly unnecessary to a determination of the cause, it cannot confer jurisdiction on this Court to entertain a review by writ of certiorari. Section 344 of Title 28 U. S. C. A. confers on this Court jurisdiction by writ of certiorari "with like effect as if brought up by writ of error." The firmly established rule that the federal question alleged to have been improperly decided must have been necessary to the determination of the case was announced by this Court in *Harrison* v. *Morton*, 171 U. S. 38, 47, in the following language:

> "It is settled law that, to give this Court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, *but that its decision was necessary to the determination of the cause*, and that it was actually decided adversely to the party claiming a right under the Federal laws or constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 20 Wall. 590; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635." (Italics ours.)

Additional authorities to the same effect are cited under Point IV (p. 6 of this brief).

Petitioner's contentions under Point II (p. 6 of his petition) that "a creditor whose claim is not dischargeable in bankruptcy may file his claim and accept dividends without waiving his right of exemption" from Section 17 of the Act, is beside the point. The question presented by the facts in the case at bar is whether a claimant may tender an issue in objections filed to the bankrupt's discharge that his claim is dischargeable, and upon that theory, litigate for thirteen years, and upon the determination of that question, be permitted to reverse his theory in the State Court in a suit to revive the money decree. None of the three cases cited by petitioner is in point, since in none of them was

there an issue tendered in the pleadings that the claim was dischargeable in bankruptcy.

But whether the Appellate Court is correct or in error in stating this additional reason for reversal, we must conclude: that the portion of the opinion finding that the issue tendered by petitioner's allegation in his objections to discharge resulted in an adjudication of the dischargeability of his claim, is *a question primarily of pleading, and not of federal law;* is wholly unnecessary to a determination of the cause, and confers no jurisdiction on this Court. Said petition should, therefore, be denied.

V.

On pages 12-16 of his brief, petitioner has made allegations and charges too serious to be ignored, but which are not within the scope of his petition, are not supported by anything in the record, and the same should be disregarded by this Court.

(a) Petitioner has challenged the regularity of the bankruptcy proceedings and this respondent's conduct therein (pp. 12, 13, 14, petitioner's brief).

Neither the schedules referred to on pages 12 and 13, nor the testimony of witnesses before the referee, nor the stipulation referred to, are in evidence, nor does respondent now, after sixteen years, have access to these documents. This respondent can only say that the matters relating to his bankruptcy were heard by Referee Wean, and, on objection, by Judge Carpenter. Various motions and petitions were thereafter heard by Referee Parkin, and Judge Wilkerson, who reviewed the history of the case (R. 19-21), and concluded his memorandum opinion holding that "the motion of the objecting creditor Strobl to vacate the order

of discharge heretofore entered in this cause and to reopen the cause, therefore, must be denied."

It is submitted that the matters charged, if they existed, could not have escaped the attention of two referees and two judges who had the matter of respondent's discharge under consideration in one form or another from 1924 to 1937.

(b) Petitioner again goes outside the record to charge that this respondent has been guilty of bribing respondent's attorneys (pp. 14-16, petitioner's brief).

This respondent earnestly protests his innocence of this most serious charge, and calls this Court's attention to the fact that most of the alleged conversations cited by petitioner as evidence are said to have occurred in court before presiding judges. If petitioner were convinced that such corrupt methods had been employed by this respondent, it can hardly be supposed that Referees Wean and Parkin, Federal Judges Carpenter and Wilkerson, and State Court Judge Williams, in the period from 1924 to 1939, would have failed to detect, or would not have become informed of such corruption. If the charges were true one or more of these officials would most certainly have seen that punitive proceedings were instituted against this respondent.

But under the numerous authorities listed under Point V (p. 7 this brief), this Court cannot be called upon to consider matters not included in the petition. Since the above matters referred to on pages 12-16 of petitioner's brief are omitted from the petition as well as the record, it is earnestly submitted that they should be entirely disregarded.

CONCLUSION.

The case was properly decided by the Appellate Court. There is no conflict of opinion on the federal question on which it was decided. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN ZIDEK, JR.,
Respondent pro se.